In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 748

GEORGE F. ZIMMERMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Here, as in the Court of Appeals (see R. 372), with two exceptions which we discuss below, the contentions urged by petitioner involve simply the sufficiency of the evidence to support his conviction of using the mails in the execution of a scheme and artifice to defraud. The indictment charged that petitioner, a lawyer (R. 241, 308), and one R. L. Slaughter, who had died before this prosecution was commenced (R. 3, 239), doing business as

Brown Bros., Austin, Texas, devised a scheme and artifice to defraud the customers of the firm and to obtain money and property by means of false and fraudulent pretenses, representations, and promises. Each of the nine counts of the indictment charged a separate use of the mails in carrying out this scheme. (R. 3-8.) Petitioner was tried before the court, a jury having been waived (R. 11, 27). Two of the counts were dismissed on the motion of the United States Attorney (R. 11, 246), and the court found petitioner guilty on each of the remaining counts (R. 11, 360). He was sentenced to two years' imprisonment and fined $1,000 on each count, the imprisonment sentences to run concurrently (R. 19-20).

The fraudulent nature of the scheme and the guilt of petitioner were amply established at the trial. The evidence is summarized in the opinion of the Court of Appeals (R. 371-377; 171 F. 2d 790), and it seems unnecessary to discuss it here, except to add that one of the victims of the scheme testified that, after she learned of the firm's insolvency, she went to petitioner and demanded her money and that the following colloquy ensued (R. 224):

> A. Well, he said the firm had been insolvent since 1938, and I said, "You took my money the first of the year, 1944," which was the check of December 31st.
>
> Q. And what else did he say?

> A. I said, "Mr. Zimmermann, don't you know that is a penitentiary offense?" and he said, "Yes."

As a lawyer, petitioner must have understood the implications of his answer. It is clear, therefore, contrary to his contention, that the evidence showed him to be a conscious participant in the scheme to defraud.

Both courts below having found the evidence sufficient to support petitioner's conviction, we submit that there is no occasion for further review of the evidence by this Court. See *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

Petitioner also objects here (Pet. 14-15), as he did in the Court of Appeals (see R. 372), to the admission of testimony regarding statements made by Slaughter tending to show that Slaughter was carrying on the alleged scheme to defraud. The objection was that this evidence was not admissible against petitioner unless the latter was a conscious promoter of Slaughter's criminality (R. 76). Although the trial court observed that the objection was probably good as of the time it was made (R. 76), the United States Attorney stated in effect that the evidence would establish that petitioner was a party to the fraudulent scheme (R. 76-77). The trial court agreed to defer ruling on the objection (R. 77), but no further ruling appears to have

been made. As the Court of Appeals held, there can be no question of the admissibility of this evidence in view of the totality of the proof adduced by the Government. Moreover, the statement of petitioner to one of the victims, quoted above, constituted a definite admission that he was a conscious promoter of the scheme to defraud.

Finally, petitioner contends (Pet. 22-30) that the Court of Appeals has in effect deprived him of his day in court by deciding the case on a basis not presented or argued in the trial court. He argues that the case was tried entirely on the theory that Slaughter's statements to five open-account creditors to the effect that their investments were safe with Brown Bros. constituted the false and fraudulent pretenses and representations relied upon by the Government to show a scheme to defraud within the mail fraud statute, whereas the Court of Appeals held that, even if no positive misrepresentations and promises were made, the petitioner's failure to close down the business after the firm became insolvent constituted a "false pretense" within the meaning of the statute (Pet. 23). However, it is clear from the opinion below that the Court of Appeals' affirmance of petitioner's conviction was based upon its holding that the evidence was sufficient to show "that he was consciously aiding and abetting what Slaughter was actively doing" (R. 375). The court's additional observation (R. 375-376) to the effect that the con-

tinuance of the business and concealment of its hopeless insolvency itself constituted a false pretense within the mail fraud statute is amply supported by the evidence and is consistent with the charges of the indictment that petitioner and Slaughter used the mails in furtherance of a scheme to defraud and also to obtain money by false and fraudulent pretenses, representations, and promises.

Petitioner presents no point of substance warranting review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1949.

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